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## **Liability of Public Utility for Temporary Interruption of Service, National Food Stores, Inc. v. Union Electric Co., 494 S.W.2d 379 (Mo. Ct. App. 1973)**

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LIABILITY OF PUBLIC UTILITY FOR TEMPORARY INTERRUPTION  
OF SERVICE

*National Food Stores, Inc. v. Union Electric Co.,*  
494 S.W.2d 379 (Mo. Ct. App. 1973)

Plaintiff food store chain brought an action<sup>1</sup> to recover damages for the value of perishable items that spoiled<sup>2</sup> when defendant electric utility temporarily discontinued service to customers in selected areas as part of a plan<sup>3</sup> to conserve power during a record heat wave.<sup>4</sup> The trial court set aside plaintiff's jury verdict on the ground that there was

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1. Plaintiff alleged a contractual relationship with the utility, but charged negligence rather than breach of contract. Brief for Appellant at 9, 17, *National Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379 (Mo. Ct. App. 1973) [hereinafter cited as Brief for Appellant]. Missouri courts have recognized the availability of an action in either tort or contract for failure to deliver where a utility knew of the customer's particular need for electricity and had assured him of a continuous supply. *Ellyson v. Missouri Power & Light Co.*, 59 S.W.2d 714, 716 (Mo. Ct. App. 1933). This choice allows for greater damages under the "proximate cause" standard of negligence than by attempting to prove "contemplation of the parties" to recover for the spoilage. 5 A. CORBIN, *CONTRACTS* 75 (1964); W. PROSSER, *THE LAW OF TORTS* 619-20 (4th ed. (1971); see *Bromer v. Florida Power & Light Co.*, 45 So. 2d 658, 660 (Fla. 1949); *Hip-pard Coal Co. v. Illinois Power & Light Corp.*, 317 Ill. App. 47, 45 N.E.2d 701 (1942).

2. On appeal, plaintiff restricted its claim to loss of those perishables which could have been protected by a one- or two-hour advance notice. Brief for Appellant at 1-5. The court, however, found there was sufficient evidence for a jury to award damages for loss of sales and excess labor costs. 494 S.W.2d at 384-85.

3. 494 S.W.2d at 381 (referring to information found in Plaintiff's Exhibit 1). Union Electric's "Emergency Load Reduction or Power Curtailment" plan provided for:

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|---------------|--|
| (Phase One)   | Disconnecting service to customers with interruptable con-<br>tracts;  |
| (Phase Two)   | A 5% voltage reduction;  |
| (Phase Three) | Contacting the two-hundred largest industrial consumers,<br>and requesting that they voluntarily reduce their power<br>consumption;              |
| (Phase Four)  | A general notice to the public through the media;  |
| (Phase Five)  | Involuntary curtailment of service periodically to certain<br>specified geographical areas throughout the entire St.<br>Louis metropolitan area. |

The plan reflects a general preference for residential and commercial customers over industrial users. 1 A. PRIEST, *PRINCIPLES OF PUBLIC UTILITY REGULATION* 243 (1969) [hereinafter cited as PRIEST].

4. The St. Louis area had experienced continuous hot weather for several weeks, with the temperature exceeding 100 degrees for four days preceding the shut-off. St. Louis Post-Dispatch, July 12, 1966, at 1, col. 4.

no basis for legal liability. The Missouri Court of Appeals reversed and *held*: A utility must give reasonable advance notice of anticipated service shut-offs to protect customers from foreseeable loss or harm.<sup>5</sup>

A public utility's duty to use reasonable care<sup>6</sup> in providing adequate<sup>7</sup> and continuous<sup>8</sup> service<sup>9</sup> to its customers arises from a voluntary ac-

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5. *National Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379, 383-84 (Mo. Ct. App. 1973). On a separate issue the court held that a jury might differentiate between the utility's duty to give general notice of the anticipated interruption and a duty to give specific notice of the shut-off to those customers who had been assured an advance warning by a Union Electric sales representative. The court did not suggest, however, that a breach of one duty would require a more substantial showing than the other, although it did note the necessity of proving damage causation for recovery under either duty. *Id.* at 385.

6. Courts have required utilities to exercise reasonable care and diligence in providing service. *Langley v. Pacific Gas & Elec. Co.*, 41 Cal. 2d 655, 262 P.2d 849 (1953); *Bromer v. Florida Power & Light Co.*, 45 So. 2d 658 (Fla. 1949); *Bissel v. Eastern Ill. Util. Co.*, 222 Ill. App. 408, 415 (1921); *Humphreys v. Central Ky. Natural Gas Co.*, 190 Ky. 733, 739-41, 229 S.W. 117, 119-20 (1920); *Henneke v. Gasconade Power Co.*, 236 Mo. App. 100, 152 S.W.2d 667 (1941); *Oklahoma Natural Gas Co. v. Pack*, 186 Okla. 330, 97 P.2d 768 (1939). *But see Kohler v. Kansas Power & Light Co.*, 192 Kan. 226, 387 P.2d 149 (1963) (highest degree of care in rendering service). This duty to supply is usually distinguished from the duty to protect the public during production and use of the service, where the utility is charged with knowledge of the dangerous characteristics of the electricity or gas and the standard of care is higher. *Caraglio v. Frontier Power Co.*, 192 F.2d 175 (10th Cir. 1951); *Brown v. Potomac Elec. Power Co.*, 236 F. Supp. 815 (D.D.C. 1964); *Donovan v. Union Elec. Co.*, 454 S.W.2d 623 (Mo. Ct. App. 1970).

7. Courts have recognized liability when a utility provides inadequate service. *Telluride Power Co. v. Williams*, 172 F.2d 673 (10th Cir. 1949) (inadequate transformers prevented machines from operating); *Talpoosa River Elec. Co-op v. Burns*, 271 Ala. 435, 124 So. 2d 672 (1960) (insufficient voltage to heat chicken breeder); *Curry v. Norwood Elec. Light & Power Co.*, 125 Misc. 279, 211 N.Y.S. 441 (St. Lawrence County Ct. 1925) (secondary source did not provide sufficient electricity to satisfactorily operate movie theater).

The standard for adequacy depends upon the types of service rendered and the needs of the customers served. It does not necessarily mean the highest quality of service but rather reasonable service. *A. & T. Motor Freight v. Public Util. Comm'n*, 125 Ohio St. 617, 619, 184 N.E. 11, 12 (1932); *Colonial Prods. Co. v. Pennsylvania Pub. Util. Comm'n*, 188 Pa. Super. 163, 146 A.2d 657 (1958). *See also* Revision of Serv. Rules for Elec. Util., 40 P.U.R. (n.s.) 99, 104 (Wis. Pub. Serv. Comm'n 1941); E. JONES & T. BIGHAM, *PRINCIPLES OF PUBLIC UTILITIES* 390 (1932); 1 PRIEST 234-35; *Note, The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312 (1962).

8. *Cox v. Louisiana Power & Light Co.*, 150 So. 863 (La. App. 1933); *see Alabama Power Co. v. Henson*, 238 Ala. 348, 191 So. 379 (1939); *Arkansas Power & Light Co. v. Abboud*, 204 Ark. 808, 164 S.W.2d 1000 (1942); *City of Gainesville v. Gainesville Gas & Elec. Power Co.*, 65 Fla. 404, 62 So. 919 (1913).

9. This general duty has been defined and included in state statutes: ALA. CODE [https://openscholarship.wustl.edu/law\\_lawreview/vol1974/iss2/9](https://openscholarship.wustl.edu/law_lawreview/vol1974/iss2/9)

ceptance of a public franchise,<sup>10</sup> express or implied contracts,<sup>11</sup> and the law of negligence.<sup>12</sup> Courts have recognized, however, that a util-

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tit. 10, § 187 (1959); ALASKA STAT. § 42.05.291 (1970); ARIZ. REV. STAT. ANN. § 40-321 (1956); ARK. STAT. ANN. § 73-204(b) (1957); CAL. PUB. UTIL. CODE § 451 (Deering 1970); COLO. REV. STAT. ANN. § 115-3-1 (1963); DEL. CODE ANN. tit. 26, § 135 (1953); D.C. CODE ANN. § 43-301 (1973); FLA. STAT. ANN. § 366.03 (1968); IDAHO CODE 61-302 (1947); ILL. ANN. STAT. ch. 111½, § 32 (Smith-Hurd 1966); IND. ANN. STAT. § 8-1-2-69 (1973); KAN. STAT. ANN. § 66-107 (1972); KY. REV. STAT. ANN. § 278.030 (1969); ME. REV. STAT. ANN. tit. 35, § 51 (1964); MISS. CODE ANN. § 77-3-33 (1972); MO. REV. STAT. § 393.130(1) (Supp. 1974); MONT. REV. CODES ANN. § 70-105 (1947); NEV. REV. STAT. § 704.040 (1973); N.H. REV. STAT. ANN. § 374:1 (1966); N.J. REV. STAT. § 48:2-23 (Supp. 1973); N.M. STAT. ANN. § 68-6-2 (1961); N.Y. TRANSP. CORP. § 12 (McKinney Supp. 1973); OHIO REV. CODE ANN. § 4905.22 (Page 1953); PA. STAT. ANN. tit. 66, § 1171 (1959); R.I. GEN. LAWS ANN. § 39-2-1 (Supp. 1973); TENN. CODE ANN. § 65-414 (1955); TEX. REV. CIV. STAT. ANN. art. 1446a (1962); UTAH CODE ANN. § 54-3-1 (1974); VA. CODE ANN. § 56-234 (Supp. 1973); WASH. REV. CODE ANN. § 80.28.010 (1962); W. VA. CODE ANN. § 24-3-1 (1971); WIS. STAT. ANN. § 196.03 (1957); WYO. STAT. ANN. § 37-62 (1959).

The Pennsylvania statute, for example, provides:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities. . . . Such service also shall be reasonably continuous and without unreasonable interruptions or delay.

10. A franchise has traditionally signified the special privileges granted to a utility, allowing it to provide necessary service to the public in a designated area without competition. The utility's acceptance of these privileges establishes reciprocal rights in the public. *See, e.g.,* City of Gainesville v. Gainesville Gas & Elec. Power Co., 65 Fla. 404, 410, 62 So. 919, 921 (1913); State *ex rel.* Hairline v. Public Serv. Comm'n, 343 S.W.2d 177 (Mo. Ct. App. 1961); Danna v. Consolidated Edison Co., 71 Misc. 2d 1029, 377 N.Y.S.2d 722 (App. Div. 1972); Brewer v. Brooklyn Union Gas Co., 33 Misc. 2d 1015, 1019, 228 N.Y.S.2d 177, 182 (Queens County Sup. Ct. 1962); Curry v. Norwood Elec. Light & Power Co., 125 Misc. 279, 282, 211 N.Y.S. 441, 444 (St. Lawrence County Ct. 1925); Preston County Light & Power Co. v. Rennick, 145 W. Va. 115, 113 S.E.2d 378 (1960); Village of Little Valley, 22 P.U.R. (n.s.) 63 (N.Y. Dep't of Pub. Serv. 1938); E. NICHOLS, PUBLIC UTILITY SERVICE AND DISCRIMINATION 138 (1928); 1 O. POND, TREATISE ON LAWS OF PUBLIC UTILITIES § 254 (4th ed. 1932); 1 PRIEST 230-31; A. WEBBER, PRINCIPLES OF PUBLIC UTILITY REGULATION 101 (1941).

11. Coal Dist. Power Co. v. Katy Coal Co., 141 Ark. 337, 217 S.W. 449 (1919); Langley v. Pacific Gas & Elec. Co., 41 Cal. 2d 655, 661, 262 P.2d 846, 849 (1953); Humphreys v. Central Ky. Natural Gas Co., 190 Ky. 733, 229 S.W. 117 (1920) (reversed on question of duty to notify supplier of the breach); Lund v. Princeton, 250 Minn. 472, 479, 85 N.W.2d 197, 203 (1957); Heirs v. South Carolina Power Co., 198 S.C. 280, 285, 17 S.E.2d 698, 700 (1941).

12. The duty is imposed by law, apart from statutes or contracts; it requires the utility which holds itself out to serve the public to exercise reasonable diligence and care towards its customers. Langley v. Pacific Gas & Elec. Co., 41 Cal. 2d 655, 660-61, 262 P.2d 846, 849 (1953) (dictum); Kohler v. Kansas Power & Light Co., 192 Kan. 226, 229, 387 P.2d 149, 151 (1963); Ellyson v. Missouri Power & Light Co., 59 S.W.2d 714, 716 (Mo. Ct. App. 1933); Southwestern Pub. Serv. Co. v. Artesia Alfalfa Grower's Ass'n, 67 N.M. 108, 116, 353 P.2d 62, 67 (1960); Oklahoma Natural Gas

ity is "not an insurer of constant electric service,"<sup>13</sup> and have relieved utilities from providing service during necessary shut-offs for repairs<sup>14</sup> and emergencies,<sup>15</sup> and during interruptions beyond their reasonable control.<sup>16</sup> Nevertheless, these excused interruptions do not suspend

Co. v. Pack, 186 Okla. 330, 333, 97 P.2d 768, 770 (1939); Chrome Plating Co. v. Wisconsin Elec. Power Co., 241 Wis. 554, 562, 6 N.W.2d 692, 695 (1942); cf. 1938 Wis. L. REV. 182, 183.

13. *Henneke v. Gasconade Power Co.*, 236 Mo. App. 100, 112, 152 S.W.2d 667, 673 (1941); accord, *Waukesha Gas & Elec. Co. v. Waukesha Motor Co.*, 190 Wis. 462, 209 N.W. 590 (1926).

In the absence of express contracts, courts have generally placed the burden on plaintiffs to show that the proximate cause of the failure to provide required service was the fault of the utility. *Monolith Portland Midwest Co. v. Western Pub. Serv. Co.*, 142 F.2d 857 (10th Cir. 1944); *Senderoff v. Housatonic Pub. Serv. Co.*, 147 Conn. 18, 20, 156 A.2d 517, 518 (1959); *Milford Canning Co. v. Central Ill. Pub. Serv. Co.*, 39 Ill. App. 2d 258, 188 N.E.2d 397 (1963). But see *Bearden v. Lyntegar Elec. Coop.*, 454 S.W.2d 885, 887-88 (Tex. Civ. App. 1970) (court recognized plaintiff's prima facie case of negligence under *res ipsa loquitur* and held that it was the utility's duty to refute that it was the cause of electrical interruption).

14. *Telluride Power Co. v. Williams*, 172 F.2d 673 (10th Cir. 1949); *Davis v. Weir*, 328 F. Supp. 317 (N.D. Ga. 1971) (dictum); *Stroup v. Alabama Power Co.*, 316 Ala. 290, 292, 113 So. 18, 20 (1927); *Brame v. Light, Heat & Water Co.*, 95 Miss. 26, 48 So. 728 (1909); *Chrome Plating Co. v. Wisconsin Elec. Power Co.*, 241 Wis. 554, 6 N.W.2d 692 (1942); see *Arkansas Power & Light Co. v. Abboud*, 204 Ark. 808, 164 S.W.2d 1000 (1942). See also *Metropolitan Club v. Consolidated Edison Co.*, 276 App. Div. 1061, 96 N.Y.S.2d 144 (1950) (Public Service Commission should determine the reasonableness of the time fixed for temporary discontinuance during repairs).

15. The conditions must make it reasonably necessary to shut off power to safeguard utility or public and shut-off must not be done arbitrarily or as a result of utility negligence. *Virginia Elec. & Power Co. v. Carolina Peanut Co.*, 186 F.2d 816 (4th Cir. 1951); see *Mullen v. Otter Tail Power Co.*, 130 Minn. 386, 153 N.W. 746 (1915); *Carroway v. Carolina Power & Light Co.*, 226 S.C. 237, 84 S.E.2d 728 (1954). See generally *Collins, The Outage that Was a Blockbuster*, 66 PUB. UTIL. FORT. 234, 241 (1960); Note, *Blackout of Interconnected Electric Power Companies: Recovery and Prevention Measures*, 53 MINN. L. REV. 162 (1968).

16. The most commonly recognized excuses for non-delivery of service are acts of God. These acts or occurrences must be so extraordinary and unanticipated that they could not have been foreseen or prevented by the utility's exercise of reasonable care. *Curry v. Norwood Elec. Light & Power Co.*, 125 Misc. 279, 211 N.Y.S. 441 (St. Lawrence County Ct. 1925) (low river from closing of dam foreseeable by prudent man); see note 31 *infra* and accompanying text. They must be the cause of the interruption and may not involve negligence by the utility. *Monolith Portland Midwest Co. v. Western Pub. Serv. Co.*, 142 F.2d 857 (10th Cir. 1944) (lightning); *Arkansas Power & Light Co. v. Abboud*, 204 Ark. 808, 164 S.W.2d 1000 (1942) (ice storm, lightning); *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So. 2d 671 (1944) (hurricane); *Ellyson v. Missouri Power & Light Co.*, 59 S.W.2d 714 (Mo. Ct. App. 1933) (ice storm); *Barnet v. New York Cent. & H.R.R.R.*, 222 N.Y. 195, 118 N.E. 625 (1918) (flood); *Southern Ry. v. Cohen Weenen & Co.*, 156 Va. 313, 157 S.E. 563 (1931) (rain

the utility's duty to exercise reasonable diligence in serving the public.<sup>17</sup> Knowledge of an interruption requires the utility to promptly locate and correct any disruptions,<sup>18</sup> or provide alternate supplies if available.<sup>19</sup> In contrast to the advance notice required before permanently abandoning service,<sup>20</sup> utilities have been required to notify customers of temporary interruptions only when the interruptions were planned, the particular customer's needs were known, and notice to the customer was shown to have been possible.<sup>21</sup>

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storm); cf. *Sauer v. Rural Co-op Power Ass'n*, 225 Minn. 356, 31 N.W.2d 15 (1948) (wrongful death action where lightning knocked uninsulated wire onto customer's house; utility's "act of God" defense unavailable if utility was negligent).

Strikes by employees of the customer or utility may prevent the service from being provided, but the utility is required to use every effort to settle the dispute. *Kuhlman Plastics Co. v. Kansas City Power & Light Co.*, 400 S.W.2d 409 (Mo. 1966); *Oakland v. Key System Transit Lines*, 1 P.U.R.3d 150, 157 (Cal. Pub. Util. Comm'n 1953); 1 *PRIEST* 237; Note, *supra* note 7, at 322-23.

17. The utility's undertaking to serve the public creates an obligation to exercise care in operating its system to avoid unreasonable risks of harm to its customers. Temporary and unavoidable interruptions in service may be excused, but negligent acts or omissions which cause foreseeable harm are not. *Langley v. Pacific Gas & Elec. Co.*, 41 Cal. 2d 655, 262 P.2d 846 (1953); *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 646, 18 So. 2d 671, 675 (1944); *accord*, *Ellyson v. Missouri Power & Light Co.*, 59 S.W.2d 714 (Mo. Ct. App. 1933); *General Tel. Co.*, 44 P.U.R.3d 241, 244 (Fla. R.R. & Pub. Util. Comm'n 1962).

18. *Krier Preserving Co. v. West Bend Hearing & Lighting Co.*, 198 Wis. 595, 225 N.W. 200 (1929); *see* *Homes v. Monongahela Power Co.*, 136 W. Va. 877, 69 S.E.2d 131 (1952). *See also* E. JONES & T. BIGHAM, *supra* note 7, at 420.

19. *Ellyson v. Missouri Power & Light Co.*, 59 S.W.2d 714 (Mo. Ct. App. 1933) (electric company liable for failure to maintain alternative source as represented).

20. Although abandonment and temporary discontinuance or interruptions necessarily differ in duration, the nature of a public utility and its duty to provide for the public convenience evidence similar considerations in the regulation of all discontinuances. A utility undertaking to provide service creates a public reliance and expectations that the service will be adequate and will continue as long as needed by its customers. When conditions change and a utility seeks to abandon service, it must first receive the approval of the public service commission by showing the utility no longer has a franchise or authority to serve, public demand is minimized, a shortage of supplies exists, operation is at substantial economic loss, or that the customers have not met the necessary conditions precedent. A utility must then give reasonable advance notice so alternative service may be found and injury minimized. *Atlanta Power Co.*, 65 P.U.R.3d 269 (Idaho Pub. Util. Comm'n 1966); *Valley Mercantile Corp.*, 6 P.U.R. (n.s.) (Mont. Pub. Serv. Comm'n 1934). Merely furnishing public notice of such abandonment is not sufficient; the utility must still obtain public service commission approval. *Department of Pub. Util. v. Eastern Mass. St. Ry.*, 327 Mass. 450, 99 N.E.2d 462 (1951).

21. In *Langley v. Pacific Gas & Elec. Co.*, 41 Cal. 2d 655, 262 P.2d 846, 850 (1953), a leading case, the court held that when the utility knew of the customer's dependence on electricity to operate his fish hatchery, and had assured the customer

An earlier Missouri decision, *Ellyson v. Missouri Power & Light Co.*,<sup>22</sup> had recognized a utility's tort liability for not exercising sufficient care in providing continuous electrical service. The *National Food Stores* court cited statutory support<sup>23</sup> for a utility's general duty "to avoid

that he would be given prompt notification of all interruptions, failure to telephone plaintiff of a known interruption was a breach of contract and a tort. In parts of the case not referred to by the *National Food Stores* court, the *Langley* court limited its holding to the immediate circumstances, where the utility had shown ability to notify the customer of the interruption and the loss was foreseeable if he was not notified in time to take emergency measures to save his fish. *Id.* at 663, 262 P.2d at 851. *But see* *Stroup v. Alabama Power Co.*, 216 Ala. 290, 113 So. 18 (1927), where the Alabama Supreme Court dismissed a negligence action by a customer whose wife was being operated on in her home at 2 a.m. when the electricity was intentionally shut off to make necessary repairs. The court stated that it was common knowledge that the utility could not have notified all affected customers of a temporary suspension of the supply of current and it was unreasonable to impose this duty except where the facts indicated that the utility had knowledge of the plaintiff's need for service. *Id.* at 292, 113 So. at 20. Tort actions against water utilities for failure to notify customers of temporary interruptions have also been dismissed when the utility did not have knowledge of the customer's type of equipment and damage caused by the shut-off was unforeseeable. *Brame v. Light, Heat & Water Co.*, 95 Miss. 26, 48 So. 728 (1909). One state commission has held that a rule permitting a water company to shut off service "for any purpose at any time," is unreasonable unless it requires that notice be given to all customers affected by the shut-off. *Valley Util. Co.*, 73 P.U.R.3d 41, 45 (Ohio Pub. Util. Comm'n 1968). Gas utilities have been consistently required to notify all customers of planned or unavoidable interruptions because of the inherently dangerous quality of gas, of which the utility is charged with knowledge. *Streck v. St. Louis County Gas Co.*, 58 S.W.2d 487 (Mo. Ct. App. 1933); *Beyer v. Consolidated Gas Co.*, 44 App. Div. 158, 60 N.Y.S. 628 (1899); *Cramer v. Niagara Mohawk Power Corp.*, 45 Misc. 2d 670, 257 N.Y.S.2d 380 (Albany County Ct. 1965); *Hoehle v. Allegheny Heating Co.*, 5 Pa. Super. 21 (1897).

22. 59 S.W.2d 714 (Mo. Ct. App. 1933). The defendant utility had established a contractual relationship with a chicken hatchery by assuring it that a standby plant would be maintained. An ice storm prevented delivery of electrical service from the primary plant, and the court held that a negligence action was equally available where the power was interrupted for over five hours because the utility had exercised insufficient care to maintain the secondary source. *Id.* at 716-17.

23. The court referred to Mo. REV. STAT. § 393.130(1) (1969):

Every . . . electrical corporation . . . shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable . . . .

This statute defines the duty which the state Public Service Commission imposes on the utility to continue serving the public, but the *National Food Stores* court did not recognize this as a limit and suggested that violation of the statutory provision gives rise to a claim by a third party. 494 S.W.2d at 382. The Public Service Commission uses this provision not to award damages to the members of the public, but to impose sanctions on the utility. *Roach v. Danciger & Co.*, 4 Mo. Pub. Serv. Comm'n, 650, 656 (1917), *rev'd on other grounds*, 275 Mo. 483, 205 S.W. 36 (1918). The Illinois Supreme Court interpreted a similar statute, ILL. ANN. STAT. ch. 111½, § 32 (Smith-Hurd

undue harm to its customers,"<sup>24</sup> but expanded *Ellyson* by relying on a California case, *Langley v. Pacific Gas & Electric Co.*<sup>25</sup> *Langley* imposed on utilities a specific duty to exercise reasonable diligence to notify a customer of an actual interruption where the customer's dependence on electrical service was known<sup>26</sup> and the utility had evidenced its ability to notify.<sup>27</sup> The California court stated that a utility was under no duty to ascertain possible loss to all customers, and "[i]n absence of the particular needs of a customer, a utility is not required to give notice of a power failure."<sup>28</sup>

The defendant electric utility in *National Food Stores* was well aware of the record heat wave and the company's inability to satisfy the increased demand for power.<sup>29</sup> Thus, the planned shut-off<sup>30</sup> was

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1966), and determined that a showing of a statutory violation was insufficient to support a negligence action for failure to provide electrical service. The court required proof of a duty of due care, negligence, and proximate cause. The court thus suggested that the statute did not properly supplement the utility's duty toward the public. *Milfred Canning Co. v. Central Ill. Pub. Serv. Co.*, 39 Ill. App. 2d 258, 265, 188 N.E.2d 397, 400-01 (1963).

The *National Food Stores* court's reference to statutory support would have been more appropriate under a stronger provision, such as TEX. REV. CIV. STAT. ANN. art. 1446a(1) (1962), where the state policy is clearly expressed:

"Utilities" as herein defined are dedicated to the service of the public, and the primary duty of such a utility, its management and employees, is the maintenance of continuous and adequate service at all times in order that the safety and health of the people may be protected against the danger inherent in the disruption or cessation of such service. All courts and all administrative agencies of this state are enjoined to recognize this policy and in particular, to interpret and to apply this Act in accordance with such policy.

24. 494 S.W.2d at 382.

25. 41 Cal. 2d 655, 262 P.2d 846 (1953).

The court in *Ellyson* recognized the utility's duty, as discussed in *National Food Stores*, to avoid undue harm to its customers during an excused interruption. The earlier Missouri decision had required the utility to resume service power within a reasonable time to a particular customer whose needs and probable damages were within the contemplation of the parties. *Ellyson v. Missouri Power & Light Co.*, 59 S.W.2d 714, 716 (Mo. Ct. App. 1933). *National Food Stores* defined negligence as including both unexcused interruptions and failure to give advance notice to enable customers to avoid reasonably foreseeable damages as a result of anticipated service interruptions. 494 S.W.2d at 383-84.

26. *Langley v. Pacific Gas & Elec. Co.*, 41 Cal. 2d 655, 661-62, 262 P.2d 846, 850 (1953).

27. *Id.* at 661-62, 262 P.2d at 850.

28. *Id.* See note 21 *supra* and accompanying text.

29. The heat wave had been putting heavy demands on the utility for weeks and when the situation became extremely intense, the utility put its "Emergency Load Reduction or Power Curtailment Plan" into effect at 7:55 a.m. on July 11, 1966, by discontinuing service to customers with interruptible contracts. By 10:00 a.m. the elec-



properly characterized by the court as an anticipated, unavoidable interruption,<sup>31</sup> rather than an unforeseeable disruption caused by an "act of God." It was undisputed that the utility acted reasonably in rationing the power supply and that it exercised due diligence in restoring service to its customers.<sup>32</sup> The court's determination of a legal duty to give reasonable advance notice of anticipated interruptions avoided discussion of the utility's argument that it was impossible to give meaningful notice to the more than 100,000 customers affected by the shut-off,<sup>33</sup> whether the notice requirement has been met in a

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trical demand had exceeded 3,000 megawatts, the amount used during the peak demand in the previous year, and was within 290 megawatts of capacity. The utility then began telephoning the 200 largest industrial consumers and completed this phase by 12:30 p.m. These telephone calls were to request voluntary reductions in consumption and were neither warnings nor notifications of an anticipated outage. The court reasoned that the initiation of its emergency plan indicated the utility's awareness of the critical situation and that involuntary curtailment, as provided in the plan, might be necessary. Brief for Appellant at 2-3.

30. After omitting Phase Four of its Emergency Plan, Union Electric began disconnecting a number of electrical feeders serving the public. 494 S.W.2d at 381; cf. St. Louis Post-Dispatch, July 11, 1973, at 8, col. 4. Union Electric's president had telephoned the Public Service Commission before putting the sectional shut-off into effect and the Commission agreed that this was the best course to follow.

31. The court determined that the utility had no control over the inadequate supply of power during this heat wave, but recognized that plaintiff's claim was not for discontinuance of service. 494 S.W.2d at 382. An ingredient of the requisite "reasonable care" to provide adequate service would include proper planning to meet foreseeable or contemplated changes in consumer demand. *Curry v. Norwood Elec. Light & Power Co.*, 125 Misc. 279, 211 N.Y.S. 441 (St. Lawrence County Ct. 1925) (electric utility could have anticipated insufficient power supplies if upstream dam was closed and should have made provision for alternative source to give service when desired by public); see *Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318, 146 P. 640 (1915) (utility obligated to anticipate reasonable growth of needs and have sufficient supplies to meet reasonable demands of public); Note, *Blackout of Interconnected Electric Power Companies*, 53 MINN. L. REV. 162 (1968) (suggesting a utility could be held liable for inadequate planning); cf. St. Louis Post-Dispatch, July 12, 1973, at 1, col. 7 (reporting a Union Electric spokesman declared that primary reason for shortage which caused the events in *National Food Stores* was incompleteness of an additional plant due to skilled labor shortage).

32. 494 S.W.2d at 382.

33. The court superficially distinguished the utility's additional argument that its filed tariff limited the extent of the company's liability. *Id.* at 384.

The Missouri Supreme Court has held that when a telephone company filed a reasonable tariff, and the utility did not act willfully, intentionally, or maliciously, its liability is the amount of the customer's actual impairment, and in no event is the liability to exceed the amount paid for services. The court recognized that the weight of authority viewed the tariff as becoming part of the law once it is filed, regardless of whether the customer knew of the tariff. *Warner v. Southwestern Bell Tel. Co.*, 428 S.W.2d

particular case is left to the jury.<sup>34</sup> Moreover, the court did not require a showing that the utility had specific knowledge of plaintiff's susceptibility to damage before imposing a duty to notify. This suggests that a utility may be liable for reasonably foreseeable damages to all customers injured during the shut-off.<sup>35</sup>

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596, 601 (Mo. 1968). Courts have reasoned that the strict regulation of the rights and privileges of a utility or public carrier in the public interest warrant the regulation of liabilities, for they at least indirectly affect the rate structure. *Western Union Tel. Co. v. Esteve Bros.*, 256 U.S. 566, 571 (1921); *Warner v. Southwestern Bell Tel. Co.*, *supra*.

The *National Food Stores* court failed to deal directly with the *Warner* decision and instead noted the difference between telephone and electric utilities. The tariff filing provisions for the former are mandatory, while the latter may file. MO. REV. STAT. § 392.200 (1969) (telephone); *id.* § 393.140(11) (electric utility); *see* 494 S.W.2d at 384. The pertinent fact, that the Public Service Commission had accepted the defendant's tariff, was not dealt with by the court. A distinction between negligent disruption and negligent failure to warn of interruptions and shut-offs is superficial. It fails to deal with the policy reasons for limiting liability through approved tariffs, which are supervised by a commission charged with the public interest and empowered to ensure this end. *See id.*

34. The court did not discuss the requirements of "reasonable notice," except to imply that a notice to the media was required. 494 S.W.2d at 384-85.

During the power shortage, the utility maintained service through as many electrical feeders as the capacity of the system would allow. The demand for electricity was constantly fluctuating and the utility could not precisely predict how many feeders would have to be disconnected to prevent a system overload. Union Electric argued, therefore, that it was impossible to give the one- or two-hour warning which plaintiff had pleaded as being necessary to prevent spoilage. Brief for Respondent at 4, *National Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379 (Mo. Ct. App. 1973) [hereinafter cited as Brief for Respondent].

The burden of the power shortage was shifted throughout the St. Louis area during the two-day period by rotating the feeders to be disconnected on two- to three-hour intervals. While there were indications that the general geographic areas to be affected had been predetermined, Union Electric argued that the extensive interlacing of the electrical feeders in the neighborhoods, *see* note 21 *supra*, prevented the utility from giving a meaningful advance warning through public media of the specific customers to be affected. This message would have been confusing to the public and would have been an open invitation to the criminal element to plunder the unprotected area. Brief for Respondent at 4-5. *See also* St. Louis Post-Dispatch, July 12, 1966, at 1, col. 4. *But see* Collins, *supra* note 15, at 240-41 (power cut off without notice to over one-half million New York residents; reported crime dropped 50% when police took preventive measures).

Union Electric argued that it would have been impossible to give individual notice to the more than 100,000 customers affected and rejected plaintiff's contention that the utility's ability to telephone its largest customers during Phase Three indicated a capacity to notify the other customers prior to Phase Five of its Emergency Plan. Brief for Respondent at 4-5.

The significance of *National Food Stores* should not be minimized, since power shortages are common. The expansion of the utility's standard of reasonable care to include notification of anticipated shut-offs is a proper ingredient of the obligation to exercise diligence in minimizing inconvenience and injury during temporary interruptions.<sup>36</sup> The potential difficulty presented by *National Food Stores* is whether future courts will be able to instruct juries without subjecting utilities to liability in every instance.<sup>37</sup>

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The court disposed of the utility's second argument that plaintiff's action was requesting discrimination in service by extending the notice obligation to all customers similarly situated. *Id.* at 384. No case cited or found goes this far, but the assertion is a logical extension of the court's new interpretation of the general duty to prevent harm to the utility's customers. *Humphreys v. Central Ky. Natural Gas*, 190 Ky. 733, 229 S.W. 117 (1920), is the leading case stating that utilities cannot give special treatment to some customers to the detriment of others. The case recognizes a utility's implied obligation to render service within the reasonable contemplation of the parties:

We do not, of course, mean to say that a gas company is under an absolute duty to furnish each or any of its customers the precise quantity of gas . . . needed . . . , because it might not be reasonable or practicable for it to do this without discrimination . . . . Public service corporations . . . must treat all customers alike.

*Id.* at 740, 229 S.W. at 120. The *National Food Stores* court's reference to a utility as a unique monopoly, a supplier of an indispensable service, highlights the extension of the expanded notice obligation as being non-discriminatory, and within the best interests of the community which the utility is allowed to serve. 494 S.W.2d at 383. See 1 O. POND, LAW OF PUBLIC UTILITIES § 270 (4th ed. 1932); 1 PRIEST 228.

36. See note 20 *supra* and accompanying text.

37. The lower court in *National Food Stores* had instructed the jury that it could find for plaintiff if it found the utility interrupted plaintiff's electrical service without first giving reasonable notice. Brief for Respondent at 17-18. Meaningful guidelines for the proper determination of reasonable advance notice are absent from the opinion. Perhaps the Public Service Commission could best determine whether the utility was "reasonably" fulfilling its duty to the public in light of all the surrounding circumstances.